SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

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JENNIFER FUKUNAGA,

Plaintiff,

- against -

BROADWALL MANAGEMENT CORP., THE FEIL ORGANIZATION, INC., and FREE PARK ASSOCIATES,

Defendants.

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Index No. 162170/14

Seq. 001

Decision and Order

HON. ROBERT D. KALISH, J.:

Motion by Defendants Broadwall Management Corp., The Feil Organization, Inc., and Free Park Associates for summary judgment pursuant to CPLR 3212 is granted as follows:

BACKGROUND

This is a personal injury action in which Plaintiff Jennifer Fukunaga alleges that she slipped and fell on black ice on the sidewalk, sustaining personal injuries on January 28, 2013, at 7:30 PM, in front of her home, located at 65 North Ocean Avenue in Freeport, NY (the "Premises"), due to the negligence of Defendants. (Hitchcock Affirm., Ex. G [Fukunaga EBT] at 67:19.)

1. Plaintiff's examination before trial (pt. 1).

Plaintiff described the weather that day as very cold and stated that she did not recall whether there had been any precipitation that day. (*Id.* at 69:19–70:14,

71:14–71:25, 72:22–73:18, 74:24–75:09, 80:20–81:02, 87:16–81:21.) Plaintiff stated that she thought there was probably some snow on the grass but could not remember either how much snow there was or whether it snowed the night before or a few days before. (*Id.* at 64:17–65:06, 74:24–75:04.) Plaintiff stated that, except for the ice on which she slipped, she did not see any snow, ice, salt, or sand on the roads, sidewalks, paved paths, or parking lot around the Premises. (*Id.* at 63:13–65:08, 71:20–25, 79:22–24, 80:03–05, 89:20–22, 100:11–16, 169:03–10.)

2. The climatological data.

National Oceanic and Atmospheric Administration ("NOAA") records, submitted by Defendants, from the John F. Kennedy International Airport weather station ("JFK") establish that .1 inches of snowfall precipitation and .19 inches of water equivalent precipitation fell at JFK on the date of Plaintiff's alleged accident. (Hitchcock Affirm., Ex. F [NOAA Records] at 2, 3, 7.) This precipitation consisted of rain, snow, ice pellets, and mist. (*Id.* at 2, 3.) NOAA recorded this precipitation as having fallen from between the hours of 9:00 AM and 10:00 AM to between the hours of 8:00 PM and 9:00 PM. (*Id.* at 3.) This precipitation fell in trace amounts between 9:00 AM and 12:00 PM and between 5:00 PM and 7:00 PM. (*Id.*) It reached its highest hourly value, .06 inches, between 3:00 PM and 4:00 PM. (*Id.*) Between 7:00 PM and 8:00 PM, the hour of the alleged incident, .03 inches of this

precipitation fell. (*Id.*) Temperatures at JFK on this day averaged 30 degrees Fahrenheit, with a high of 35 and a low of 24. (*Id.* at 2.)

NOAA also measures the depth of snow and ice on the ground every day at 7:00 AM. The only measured depth of snow or ice on the ground at JFK in the entire month of January 2013 consists of a single inch recorded for January 26, 2013. (*Id.*) On January 25, 2013, precipitation fell at JFK that included .8 inches of snowfall and .05 inches of water equivalent. (*Id.*) On January 26, 2013 and January 27, 2013, no precipitation fell at JFK. From January 1, 2013 to January 24, 2013, NOAA recorded snowfall precipitation at JFK on five days, with .1 inches per day on two of the days and a trace amount per day on three of the days, and recorded water equivalent precipitation which fell on ten days and totaled to 1.64 inches, with the highest daily level of .82 inches falling on January 16 and with approximately .03 inches falling from January 17 to 24. (*Id.*)

3. Plaintiff's examination before trial (pt. 2).

Prior to the alleged incident, at about 7:30 PM, Plaintiff testified that she walked the following route with her son, age three or four at the time, on the way to her car, which was parked across the street from the Premises on Randall Avenue: first, they exited through the front door of her apartment building; then, they walked down the front steps of her building; next, they proceeded along the straight pathway connecting the front steps to the sidewalk abutting the Premises

and North Ocean Avenue; after that, they went left on the sidewalk abutting the Premises until they came to a curved walkway which connects the North Ocean Avenue sidewalk and the parking lot on the Randall Avenue side; finally, they took that curved walkway to the parking lot, cut through the parking lot in the direction of the curb cut, and arrived at the spot of the alleged incident—the sidewalk flag between the parking lot and curb cut. (*Id.* at 95:08–11, 146:04–163:13.)

During Plaintiff's deposition, Plaintiff was shown copies of photographs of the area in which the alleged accident occurred. Plaintiff's counsel did not allow Plaintiff to mark the accident location on the relevant photograph or photographs.[1] (Landsberg Affirm., Ex. A [Fukunaga EBT Exh. A–F].)

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[1] Defendants' counsel, Mr. Hanson, asked Plaintiff to "circle for [him] specifically where [her] incident occurred." (Fukunaga EBT at 146:21–22.) Plaintiff's counsel, Ms. Sobolev, then objected, saying she did not want Plaintiff to "create any evidence" and telling Plaintiff she could "describe it with [her] words, if that's okay with [Plaintiff]." (*Id.* at 146:23–147:01.) After more questioning, this colloquy began between the attorneys at the Fukunaga EBT:

> MR. HANSON: You are not going to let her mark the specific location of the sidewalk where she fell?
> MS. SOBOLEV: Yes, that's correct.
> MR. HANSON: Is there a reason why you are not going to let her? I mean, it's a long sidewalk here and it would be nice to have a specific --
> MS. SOBOLEV: I mean --
> MR. HANSON: -- location of where it was.
> MS. SOBOLEV: I believe she explained it to the best that she can with her words. I'm not going to let her mark the exhibit and create, you know, evidence. This is a deposition.
> MR. HANSON: I mean, this is (indicating) -- the photograph is evidence. I just want to get a clarification of where the incident actually happened.
> MS. SOBOLEV: I think she described it with her words. You know, if you want to --
> MR. HANSON: I don't want to have to make a motion to bring her back to locate the specific area of where her incident occurred.
> Q. [Mr. Hanson] Would you be able to mark on this picture specifically where you fell?
> A. [Ms. Fukunaga] She just explained that I'm not allowed.
> Q. No. Would you be able to do that?
> A. What do you mean?
> Q. Looking at this photograph, would you be able to identify specially where you fell?
> A. I just explained to you where I fell, on the sidewalk.

Plaintiff stated that, at the time of her alleged accident, she was looking straight ahead, felt her son begin to slip, maneuvered herself to catch him, and then herself slipped, falling backward immediately with her feet touching the curb cut in front of her and her buttocks landing in the middle of the sidewalk flag. (Fukunaga EBT at 37:03–08, 44:23–24, 46:05–11, 93:25–96:09, 162:01–163:25.) Plaintiff stated that the "black ice" spot where she and her son fell consisted of a circular mass, approximately three feet in diameter, located in the center of the sidewalk flag between the parking lot on the Randall Avenue side of Plaintiff's apartment building and a curb cut on Randall Avenue "[a] little after the stop sign." (*Id.* at 60:18–22, 88:16, 92:22–93:24, 108:04–109:07, 162:16–164:06.)

4. Steve Radoncic's examination before trial.

At the time of Plaintiff's alleged accident, Steve Radoncic was employed by Defendants as the superintendent of the Premises. (Hitchcock Affirm., Ex. H

Q. I know. But my question is, using this document right here, this photograph, Defendant's [sic] Exhibit A, would you be able to put a mark in the specific location of where your incident occurred?
A. I mean, there is nothing stopping me from not doing it.
Q. So you would be able to do that, yes?
A. Maybe.
Q. What do you mean maybe? Yes or no, can you mark it?
A. But I don't want to.
Q. But you would be able to do so?
A. Yes.
MR. HANSON: You are not going to let her do that?
MS. SOBOLEV: Correct.
MR. HANSON: Okay. I'm just going to reserve my right to -- if it gets that far -- to call her back to ask her further questions in identifying specifically where she fell in this photo.
MS. SOBOLEV: You know, if you make the proper motion to the Court and the Court grants that motion then, you know, you can reserve your right for that.

(*Id.* at 155:03–157:15.)

[Radoncic EBT] at 6:23–8:11.) At Mr. Radoncic's examination before trial, Mr. Radoncic stated that he and his staff of three workers were on duty 24 hours a day and that, if it snowed and was "necessary," i.e., depending on the circumstances, they would shovel the snow, sometimes using a snow blower depending on snow volume, and put down salt. (*Id.* at 11:07–15:07.) For any amount of snow or ice, Mr. Radoncic said he would "throw out the salt" to clear it up. (*Id.* at 20:12–17.)

Mr. Radoncic stated that he could not remember whether he and his staff undertook any snow or ice removal efforts on the date of the alleged accident. (*Id.* at 17:21–25.) Mr. Radoncic further stated that he was not required to create records regarding snow and ice conditions or removal. (*Id.* at 18:02–07, 30:19–31:05.)

Mr. Radoncic stated that there was no formal schedule for clearing the sidewalks, but rather his staff would clear the sidewalks either when they observed a need to do so or if he himself called and told them to do so. (*Id.* at 15:01–07, 16:02–17:20, 19:13–20:17.) Mr. Radoncic stated that it would be "necessary" to work to remove snow or ice anytime there was snow or ice on the sidewalk. (*Id.* at 30:10–18.) When asked if building staff were "responsible for the sidewalks outside of their own buildings," Mr. Radoncic answered that he and his staff were responsible "[f]or the clean-up of buildings, parking lots, snow removal, all that things." (*Id.* at 33:19–34:11.)

5. Orhan Deljanin's examination before trial.

At the time of the alleged accident, Orhan Deljanin was working as a porter, reporting to Mr. Radoncic and living at the Premises. (Hitchcock Affirm., Ex. I [Deljanin EBT] at 7:09–10:19.) Mr. Deljanin stated that he could not recall whether he undertook any snow or ice removal efforts on the date of the alleged accident and that his employer does not create or maintain records concerning sidewalk cleaning. (*Id.* at 23:09–25.) Mr. Deljanin stated that he was responsible for removing snow and throwing salt on the sidewalks. (*Id.* at 10:25–11:09, 12:09–14.) Mr. Deljanin further stated that in the event of snowfall, the workers cannot do anything until the snow stops falling, but thereafter will "use machines and . . . clean the sidewalk completely and . . . throw salt on it." (*Id.* at 12:07–11.)

Mr. Deljanin stated that he and other workers would "clean up the stairs or the steps in front of the building." (*Id.* at 12:13–14, 17:13–21.) Mr. Deljanin further stated that that cleaning "the pathways in between the building" and the parking lot on the Randall Avenue side next to where Plaintiff allegedly fell was something "done by the company," of which, Mr. Deljanin said, he could not recall the name but that it was "maybe something in Queens." (*Id.* at 17:22–18:08.) Mr. Deljanin stated further that the staff work "all together and . . . don't have specific duties as to what to do where." (*Id.* at 16:18–17:07.)

WRITTEN ARGUMENTS

1. Defendants' written arguments.

Defendants argue in their papers that the action should be dismissed because the applicable Village of Freeport Code does not impose tort liability on Defendants for their alleged failure to remove snow or ice from where Plaintiff fell, which, they argue, was a public sidewalk. (Hitchcock Affirm. ¶ 3.) Defendants argue further that, in the absence of such a statute or ordinance, they have met their *prima facie* burden and the burden shifts to Plaintiff, who must demonstrate that Defendants undertook snow or ice removal efforts that created a dangerous condition or made a naturally occurring condition more dangerous. (*Id.*) Defendants assert that there is no evidence beyond Plaintiff's mere speculation that Defendants made any efforts to remove snow or ice on or around the date of the alleged incident. (*Id.*) Thus, Defendants argue that they neither created a dangerous condition nor exacerbated a naturally occurring condition on the public sidewalk where Plaintiff allegedly slipped and fell. (*Id.*)

Defendants also claim to have shown *prima facie* that there was a storm in progress when Plaintiff fell such that, even if Plaintiff fell on a private path and Defendants had a duty in tort to Plaintiff, Defendants had no obligation to clear the path until a reasonable time after the cessation of the storm. (*Id.* at ¶ 4.)

Finally, Defendants assert that all claims against Defendant The Feil Organization, Inc. should be dismissed because it did not own, manage, or control the Premises. (*Id.* at ¶ 39.)

2. Plaintiff's written arguments.

Plaintiff argues in her papers that Defendants had a duty to undertake snow and ice removal to make the sidewalk where she slipped and fell safe because that spot lay on a private path at the Premises, not on a public sidewalk. (Landsberg Affirm. at 2.) Plaintiff argues that Defendants' storm-in-progress argument is unavailing because only a trace amount of precipitation was falling on the day of the alleged incident. (*Id.* at 5–6.) In the alternative, Plaintiff argues that, if she did slip and fall on a public sidewalk, Defendants had nevertheless undertaken snow removal efforts that either (1) created an ongoing duty to Plaintiff or (2) created or exacerbated a dangerous condition in that Defendants left a layer of black ice, from snow removal activities, which caused the fall. (*Id.* at 7–10.)

ORAL ARGUMENTS

1. Defendants' oral arguments.

At oral argument, which took place on August 17, 2017, Defendants' counsel first argued that Plaintiff fell on a public sidewalk. (Oral Arg. at 4:13–6:09.) Defendants' counsel argued that Plaintiff's counsel's assertion that Plaintiff

fell on a private sidewalk within the Premises directly contradicts Plaintiff's own statements, which show that she fell on a public sidewalk. (*Id.* at 46:23–49:24.)

Defendants' counsel then argued that the Village of Freeport Code does not impose tort liability with respect to shoveling a public sidewalk. (*Id.* at 6:14–7:25.) Defendants' counsel argued that the only way Defendants would be liable to Plaintiff in tort would be if they created a dangerous condition or exacerbated a naturally occurring condition. (*Id.* at 8:07–8:11, 9:08–9:11.)

Defendants' counsel admitted on the record that Defendants' "people" would "as a routine" shovel the sidewalk where Plaintiff fell. (*Id.* at 8:12–8:21.) Defendants' counsel asserted that Plaintiff's allegation that Defendants shoveled and left a layer of ice is an allegation that is made solely by Plaintiff's attorney—with no expert—is speculative, and is unsupported by the evidence. (*Id.* at 9:21–10:16, 14:04–08.) Furthermore, Defendants' counsel argued that, because Defendants always threw down salt after shoveling snow, Plaintiff seeing no snow, ice, or salt on the sidewalks is evidence that Defendants did not undertake snow removal efforts before the alleged incident. (*Id.* at 15:09–19, 16:12–22.)

Regarding Defendants' storm-in-progress argument, Defendants' counsel argued that: (1) Defendants may not have undertaken snow removal because there was a storm in progress on the day of the alleged incident; (2) freezing rain from the storm in progress could have caused the ice where Plaintiff allegedly slipped

and fell to form; and (3) a major winter storm is not necessary for a party to avail itself properly of this defense—the precipitation on the date of the alleged incident sufficed to suspend any duty in tort Defendants might have had to Plaintiff to clear the sidewalk. (*Id.* at 10:17–11:13, 22:13–16, 50:08–53:12.)

2. Plaintiff's oral arguments.

At oral argument, Plaintiff's counsel argued that Plaintiff slipped and fell on a private path. (*Id.* at 30:08–31:18.) Plaintiff's counsel argued further that Defendants took on a continuing duty to clean the sidewalks through their practice of cleaning the sidewalks, and Plaintiff and other tenants rely on Defendants' continuing duties. (*Id.* at 33:11–34:03.) Plaintiff's counsel also argued that Defendants have not met their *prima facie* burden of showing the last time Defendnats cleaned the sidewalk. (*Id.* at 34:15–17.)

Plaintiff's counsel then argued that the storm-in-progress defense should be unavailable to Defendants because: (1) the law requires that an expert interpret the NOAA records; (2) the storm had substantially or entirely abated; and (3) questions about the incident regarding either the weather conditions or how the ice may have formed raise genuine issues of material fact that preclude the Court's grant of summary judgment. (*Id.* at 34:18–35:16, 36:11–37:16, 43:02–45:09.)

ANALYSIS

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form." (*Zuckerman v City of New York*, 49 N.Y.2d 557, 562 [1980] [internal quotation marks and citation omitted].) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 N.Y.2d 72, 81 [2003].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*See Rotuba Extruders v Ceppos*, 46 N.Y.2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 [1st Dept 2002].)

Based upon the Court's reading of the submitted papers and oral argument, the Court finds that Defendants have established *prima facie* that Plaintiff fell on a public sidewalk from which they have no duty in tort to remove snow and ice. In addition, Defendants have established *prima facie* that they neither created a dangerous condition nor exacerbated a naturally occurring condition. The burden

having shifted on both issues, Plaintiff fails to raise a genuine issue of material fact in response to either *prima facie* showing.

1. Defendants establish* prima facie *that Plaintiff fell on a public sidewalk which they had no duty in tort to remove snow and ice, and Plaintiff fails to raise a genuine issue of material fact in response.

Generally, a property owner is not liable to injured pedestrians for failing to remove snow and ice that naturally accumulates on a public sidewalk abutting his or her property unless a statute or ordinance specifically imposes tort liability. (*See Roark v Hunting*, 24 N.Y.2d 470, 475 [1969]; *Ortiz v Citibank*, 62 A.D.3d 613 [1st Dept 2009].) Here, the applicable ordinance, Village of Freeport Code § 180–35, requires that property owners remove snow and ice from public sidewalks abutting their property and imposes a monetary fine on owners who fail to comply with its removal provisions. Notwithstanding the fine, the Appellate Division, Second Department has held that § 180–35 does not "specifically impose tort liability on abutting landowners for injuries sustained by a pedestrian as a result of their failure to comply with its provisions." (*Cruz v County of Nassau*, 56 A.D.3d 513, 514 [2d Dept 2008].)

The applicable section of the Village of Freeport Code (the "Freeport Code") defines a "sidewalk" as "[t]hat portion of a street between the curblines and the adjacent property lines intended for the use of pedestrians." (Freeport Code § 180–34.) The Freeport Code also provides that "[c]urb cuts must be at least three feet

from the nearest property line." (Freeport Code § 180–30.) Plaintiff herself stated that she slipped and fell in the middle of the sidewalk flag abutting the Randall Avenue curb cut and the parking lot on the Randall Avenue side of the Premises, near the stop sign. Plaintiff described this area while referencing exhibit copies of her own photographs to illustrate the precise location of her alleged incident.

Plaintiff's counsel's contentions that Plaintiff fell on a private path on Defendants' property are directly contradicted by Plaintiff's actual testimony that she fell on a sidewalk abutting the roadway, with her feet touching the curb cut. Such a "bare affirmation" of an attorney who has no "personal knowledge" of how the accident occurred is "without evidentiary value and thus unavailing." (*Zuckerman v City of New York*, 49 N.Y.2d 557, 563 [1980].) As such, the assertions by Plaintiff's counsel fail to raise a genuine issue of material fact concerning the location of Plaintiff's alleged accident.

Based upon the parties' papers and oral arguments, and the applicable sections of the Freeport Code, the Court finds that Plaintiff's alleged accident occurred on a public sidewalk.

2. Defendants establish* prima facie *that they neither created a dangerous condition nor exacerbated a naturally occurring condition, and Plaintiff fails to raise a genuine issue of material fact in response.

In the absence of a statute or ordinance imposing tort liability for failing to remove snow or ice that naturally accumulates on a public sidewalk abutting his or

her property, a landowner who nevertheless does undertake snow or ice removal on a public sidewalk must do so carefully, so as not to create a dangerous condition or exacerbate a naturally occurring condition. (*See Nadel v Cucinella*, 299 A.D.2d 250, 251 [1st Dept 2002].) In the absence of such a statute or ordinance, "the facts must still permit an inference that the defendant's snow removal efforts caused the plaintiff's injury. . . . Mere evidence of the property owner's general habits regarding snow removal are [sic] insufficient to raise an issue of fact as to whether the defendant may have engaged in snow removal that led to the accident." (*Id.* at 251–52 [internal citations omitted].)

On a motion for summary judgment, a defendant may establish *prima facie* that it did not create a dangerous condition or exacerbate a naturally occurring condition in the absence of "evidence as to when the defendant last shoveled snow from the sidewalk prior to plaintiff's accident." (*Rios v Acosta*, 8 A.D.3d 183, 184 [1st Dept 2004].) In addition, a defendant may establish *prima facie* that it did not create a dangerous condition or exacerbate a naturally occurring condition even where "defendant failed to remove *all* of the snow that was on the sidewalk," yet "most of the sidewalk was clear." (*Joseph v Pitkin Carpet, Inc.*, 44 A.D.3d 462, 463–64 [1st Dept 2007].) "The failure to remove all of the snow and ice from the sidewalk does not constitute negligence." (*See Cruz*, 56 A.D.3d 513, at 524–25.)

Here, the only evidence regarding whether snow or ice removal was affirmatively undertaken by Defendants relates to Defendants' general habits. Radoncic and Deljanin confirmed that the maintenance staff removed snow or ice as needed, after storms, at the superintendent's direction. While Defendants' counsel admits that Defendants "people" would clean the sidewalk where Plaintiff fell "as a routine," there is no direct evidence as to whether anyone undertook snow or ice removal efforts on or around January 28, 2013.

On the other hand, Radoncic and Deljanin stated that they always throw down salt to clear any snow or ice, and Plaintiff herself stated that she saw no salt. In addition, Deljanin stated that the staff would not undertake snow or ice removal until after cessation of a storm, and there is meteorological evidence that recordable precipitation was falling throughout the day of Plaintiff's accident, including during the hour that Plaintiff fell. This evidence is sufficient to establish *prima facie* that Defendants did not undertake snow removal efforts on or around the date of Plaintiff's accident.

Moreover, assuming *arguendo* that Defendants did undertake snow removal efforts on the day of Plaintiff's accident, Defendants have established that Plaintiff fell on an isolated three-foot area of "black ice" on a public sidewalk and that there was no snow, and no other ice, on the roads, sidewalks, paved paths, or parking lot in that area. As such, Defendants have shown *prima facie* that the subject area

constituted an isolated accumulation of "black ice" with no evidentiary link to any supposed negligence by Defendants. (*See Nadel v Cucinella*, 299 A.D.2d 250, 251 [1st Dept 2002] [holding that "the facts must still permit an inference that the defendant's snow removal efforts caused the plaintiff's injury"]; *see also Bonfrisco v Marlib Corp.*, 30 A.D.2d 655, 655 [1st Dept 1968], *affd.* 24 N.Y.2d 817 [1969] [holding that liability may not be found "by the mere showing that an isolated thin patch of ice was present some hours after snow removal"]; *cf. Santiago v New York City Hous. Auth.*, 274 A.D.2d 335, 335 [1st Dept 2000] [holding that there was a genuine issue of material fact as to "whether the ice on which plaintiff allegedly slipped was formed as a result of the piles of snow on either side of the pathway, created by defendant's grounds keepers in removing almost two feet of snow that had fallen within a week of the accident, melting and refreezing"].)

Based upon the foregoing, Defendants have shown *prima facie* that they neither created a dangerous condition nor exacerbated a naturally occurring condition at the site of Plaintiff's alleged accident.

As a result, the burden shifts to Plaintiff to raise a genuine issue of material fact. Plaintiff stated that, on the day of the alleged incident, she did not see any snow, ice, salt, or sand on any of the sidewalks or paths on or abutting the Premises or on the parking lot area of the Premises on the Randall Avenue side. Plaintiff asks this Court to conclude that Defendants caused her alleged injury because they

had a habit or practice of removing snow from the public sidewalks in that area and may have done so improperly.

Such speculation is insufficient to raise a genuine issue of material fact. (*Gibbs v Rochdale Village*, 282 A.D.2d 706, 707 [2d Dept 2001].) Plaintiff's theory—that "[d]ue to improper snow and ice removal, the Defendants left a layer of black ice on the path" (Opp. Affirm. ¶ 6)—fails to provide a basis for imposing liability on Defendants, as "[t]he failure to remove all of the snow and ice from the sidewalk does not constitute negligence." (*Cruz*, 56 A.D.3d 513, at 524–25 [internal citations omitted]; *see also Rivas v New York City Hous. Auth.*, 140 A.D.3d 580, 581 [1st Dept 2016] [holding that the plaintiff's expert's affidavit—which stated that "ice could only have been present due to an inadequate salting of the snow that caused the snow to melt, but did not prevent it from refreezing"—was insufficient to raise a genuine issue of material fact]; *cf. Rector v City of New York*, 259 A.D.2d 319 [1st Dept 1999] [holding that there was a genuine issue of material fact as to whether the actions of store owner's employees in removing between 9.0 inches and 14 inches of accumulated snow from sidewalk increased the hazard to pedestrians by exposing a thin layer of ice underneath]).

Based upon the parties' papers and oral arguments, the Court finds that Defendants neither created a dangerous condition nor exacerbated a naturally occurring condition on the public sidewalk where Plaintiff's accident allegedly

occurred. As such, the Court need not address any application of the storm-in-progress doctrine—which may suspend an owner's duty in tort to protect persons from related hazards on the owner's own property, only—to the instant case.

CONCLUSION

Accordingly, it is hereby

ORDERED that Broadwall Management Corp., The Feil Organization, Inc., and Free Park Associates' motion for summary judgment is GRANTED and the complaint is dismissed as against said Defendants; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Defendants Broadwall Management Corp., The Feil Organization, Inc., and Free Park Associates.

Dated: September 21, 2017
New York, New York

ENTER:

HON. ROBERT D. KALISH
J.S.C.